(8)

No. 97-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.,

Petitioner,

vs.

MICHETTI PIPE STRINGING, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does a defendant's receipt, via facsimile, of a properly filed state court summons and complaint commence the time for removal under 28 U.S.C. § 1446(b), which plainly states that the "thirty days" for removal starts upon the defendant's "receipt" of the complaint "through service or otherwise"?

STATEMENT PURSUANT TO RULE 29.6

Michetti Pipe Stringing, Inc. has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Respondent Michetti Pipe Stringing, Inc. ("Michetti"), a Canadian corporation whose largest shareholder lives in Alabama, subcontracted with Petitioner Murphy Bros., Inc. ("Murphy"), an Illinois corporation, to perform work on a gas pipeline running from Alabama to Florida. J.A. 2. Michetti sued Murphy in Alabama state court, asserting claims for breach of contract and fraud to recover damages Michetti incurred due to construction delays and unforeseen conditions at the Alabama job site. J.A. 3-5. Michetti filed its complaint in the Circuit Court of Jefferson County, Alabama, on January 26, 1996. J.A. 2. At the time of filing, Michetti requested service of the complaint by certified mail. J.A. 5.

On January 29, 1996, Michetti's counsel sent Murphy's vice president-risk manager the summons and the file-stamped complaint by facsimile. J.A. 16-17. The next day, also via facsimile, Murphy acknowledged receipt of the complaint and expressed its intent to retain local counsel and remove the case "to Federal District court." J.A. 19. Michetti perfected service on Murphy pursuant to Alabama Rule of Civil Procedure 4 on February 12, 1996. J.A. 1. Murphy filed its notice of removal on March 13, 1996, forty-four days after its vice president-risk manager acknowledged receipt of the complaint and threatened to remove the case. J.A. 6-7.

Michetti moved to remand the case to state court because Murphy's notice of removal was untimely. The District Court denied this motion (J.A. 22-24), but, upon certification of the issue, the Eleventh Circuit reversed and ordered the District Court to remand the case to Michetti's chosen state forum (J.A. 25-30). Examining both the "plain meaning" of 28 U.S.C. § 1446(b) and its legislative history, the Court of Appeals held "that the thirty-day removal period begins to run when a

defendant actually receives a copy of a filed initial pleading by any means." J.A. 27-29. In so holding, the Eleventh Circuit joined the three other federal circuit courts that have confronted this issue. J.A. 27. The Fifth, Sixth, and Seventh Circuits have all read § 1446(b) to embody a "receipt rule" for the commencement of the defendant's time for removal. *See Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841 (CA5 1996); *Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (CA6 1993); *Roe v. O'Donohue*, 38 F.3d 298, 303 (CA7 1994).

The federal courts of appeals to address this issue thus unanimously begin the thirty-day removal period upon the defendant's "receipt . . . , through service or otherwise, of a copy of the initial pleading" showing the state case is subject to removal. 28 U.S.C. § 1446(b). Murphy petitions this Court to overrule this weight of authority and hold that the removal period begins only upon proper service of process under the applicable state law. Michetti, however, urges this Court to adopt the receipt rule, which tracks the language Congress wrote and implements a uniform federal standard for determining when the period for removing cases from state to federal court commences.

SUMMARY OF THE ARGUMENT

The receipt rule is the proper reading of 28 U.S.C. § 1446(b). It not only follows the text and structure of the statute, but also effectuates a uniform procedure for calculating the thirty-day removal period. Applying the receipt rule to the present case, Petitioner Murphy's removal was untimely because Murphy failed to file its notice of removal "within thirty days" after it "otherwise" received a file-stamped copy of the summons and complaint.

The text of § 1446(b) plainly requires the defendant to file its notice of removal "within thirty days after receipt" of the initial pleading "through service or otherwise." Murphy's reliance on "service" as the exclusive triggering event cannot be reconciled with the statute's next two words: "or otherwise." That should be the end of this case. To date, every appellate court to consider this issue has so held. Against this unambiguous language and weight of authority, Murphy petitions this Court to adopt the so-called proper service rule, thereby effectively rewriting § 1446(b) to read, "The notice of removal must be filed within thirty days of service of process." This interpretation cannot be correct, given the judicial amendment of the statutory text it would require.

Even if the text contained some ambiguity (which it does not), the legislative history confirms that Congress drafted § 1446(b) to establish a uniform federal standard, independent of state law. The edited version of the statute proposed by Murphy has more in common with the 1948 version of § 1446(b), which tied the removal period to "commencement of the action or service of process," than its 1949 amendments, in which Congress codified its preference for a uniform federal standard over one complicated by fifty different procedural systems. The Petitioner's proposed "proper service rule" thwarts the legislative intent by reincorporating the state service procedures that Congress deleted. By contrast, the receipt rule effectuates § 1446(b)'s legislative purpose by synchronizing the time for removal with the moment the defendant receives notice of a removable complaint, regardless of whether service is technically perfected under state law. Reading § 1446(b) as embodying a receipt rule implements a uniform federal standard grounded in the text, structure, and purpose of the statute. Any other interpretation would rewrite a jurisdictional removal statute which should be strictly construed.

ARGUMENT

I.

THE TEXT OF 28 U.S.C. § 1446(b) STARTS THE TIME FOR REMOVAL WHEN THE DEFENDANT RECEIVES NOTICE OF A REMOVABLE COMPLAINT "THROUGH SERVICE OR OTHERWISE."

"The time, the process, and the manner" of removal is subject to Congress's "absolute legislative control." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816). This basic tenet should end the inquiry. By wording the statute as it has, Congress has declared that receipt of a complaint through means other than service of process shall begin the time for removal. This has been the rule for fifty years. Any court that embraces the "proper service rule" undermines Congress's "absolute legislative control" over this subject. To the extent, as the petitioner and *amici* contend, the consequences of the rule or public policy dictate a different rule, those arguments are best directed to "Congress, not the courts." *Dunn v. CFTC*, 519 U.S. —, 137 L. Ed. 2d 93, 106 (1997). *See also Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

Congress drafted 28 U.S.C. § 1446(b) to commence the time period for removal when the defendant receives notice of a removable complaint filed in state court, regardless of the manner by which it is received. The first paragraph of § 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the *receipt* by the defendant, through service *or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b) (emphasis added).

Resolution of this case turns upon the statutory "language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The judiciary's task "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). In other words, when the language of a statute is clear, the first canon of statutory interpretation — "that a legislature says in a statute what it means and means in a statute what it says" — is also the last, and "judicial inquiry is complete." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Rake v. Wade*, 508 U.S. 464, 471 (1993) ("Where the statutory language is clear, our sole function . . . is to enforce it according to its terms.") (internal quotation omitted)). Strict construction is especially apt in the present case because § 1446(b) is a jurisdictional statute, a removal statute, and a deadline statute. *See Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (strict construction of jurisdictional statutes); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (strict construction of removal statutes); *United States v. Locke*, 471 U.S. 84, 93-94 (1985) (strict construction of deadline statutes).

The language of § 1446(b) is plain and straightforward. Congress emphasized "receipt" and placed "through service or otherwise" in a prepositional phrase set off by commas. Hence, the statute confirms that receipt of notice is the triggering event, not proper service. This conclusion also flows from Congress's

use of the word "otherwise," which Webster's defines simply as "in a different manner; in another way, or in other ways." *Webster's New International Dictionary of the English Language (Unabridged)* 1729 (2d ed. 1954). Because Murphy "otherwise" received a file-stamped copy of the summons and complaint but failed to file its notice of removal "within thirty days after the receipt," its removal was untimely under the plain and ordinary meaning of § 1446(b).

There is nothing ambiguous about this statute; its words are clear albeit sweeping. As long as the defendant has "otherwise" received notice of a removable action filed in state court, § 1446(b)'s the removal clock begins ticking. Murphy strives to transform the statute's breadth into ambiguity. But the fact that the time for removal may start "in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985). The statute is as broad as it is unambiguous, a fact confirmed by Congress's refusal to define or qualify "otherwise." *Cf. United States v. Monsanto*, 491 U.S. 600, 609 (1989); *Roe*, 38 F.3d at 303.

None of the four federal circuits to face this issue has had any difficulty deciding § 1446(b) means what it says. In the decision below, the Eleventh Circuit's analysis "beg[an] and end[ed] with the three italicized words": "*receipt* by the defendant, through service *or otherwise*." J.A. 27. The Sixth Circuit similarly found the interpretation of this "clear statutory language" to be "straightforward." *Tech Hills II*, 5 F.3d at 968. The Seventh Circuit held that "[a]ny other conclusion" drawn from this "express language" would "drain[] the words 'or otherwise' of meaning." *Roe*, 38 F.3d at 303-04. The Fifth Circuit agreed, concluding that "the plain language of § 1446(b)" begins the thirty-day removal period "when the defendant receives a copy of the initial pleading through *any*

means, not just service of process." *Reece*, 98 F.3d at 841. The extensive judicial editing of a congressional enactment needed to accomplish the "proper service rule" persuaded all the federal circuits to adopt the receipt rule instead.

Murphy now invites this Court to rewrite Congress's language to read, "The notice of removal of a civil action or proceeding shall be filed within thirty days after service of process of the initial pleading." Not only would the "proper service rule" require this Court to delete the phrase "or otherwise," it would also involve adding "of process" after the word "service" as well as excising the entire second half of the first paragraph, which alternatively starts the removal period with "service of summons upon the defendant if [the] initial pleading has then been filed in court." 28 U.S.C. § 1446(b). The fact that Congress made the first alternative more expansive (through its use of "through service or otherwise") than the second should be dispositive.

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.

Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991). The argument that "proper service" is the exclusive means to start the thirty-day removal period simply cannot be reconciled with what § 1446(b) actually says.

The receipt rule not only implements the text of § 1446(b) as written, it also establishes manageable conditions for proper removal. Although the *amici* describe a "parade of horribles" that could result if Congress really meant "receipt . . . , through service or otherwise," the statutory text exposes these horribles

as mere hyperbole. For example, the removal period would not start if the defendant received a courtesy copy of an unfiled draft complaint, because such a copy would not be, in § 1446(b)'s words, an "initial pleading setting forth [a] claim for relief" in an "action or proceeding." *See* J.A. 30; *Kerr v. Holland America-Line Westours, Inc.*, 794 F. Supp. 207, 213 & n.5 (E.D. Mich. 1992); *Campbell v. Associated Press*, 223 F. Supp. 151, 153 (E.D. Pa. 1963). The same would be true if the filed complaint does not reveal the existence of federal subject matter jurisdiction, either because it failed to indicate the citizenship of the parties or the amount in controversy. *See* 28 U.S.C. § 1446(b) (second paragraph); *Wilson v. General Motors Corp.*, 888 F.2d 779, 782 (CA11 1989); *Essenson v. Coale*, 848 F. Supp. 987, 989 (M.D. Fla. 1994). An incomplete, illegible, or garbled complaint would be insufficient because such a document would not constitute a "copy." *Cf. Campbell*, 223 F. Supp at 153. Also, an unsigned copy would not be a valid "complaint" as required by Federal Rule of Civil Procedure 11. *See* 16 *Moore's Federal Practice* § 107.30[2][a][ii][A] (3d ed. 1998). *But see Reece*, 98 F.3d at 843. Sending a copy to an unauthorized employee of a corporate or governmental party would be improper "receipt" under Federal Rule of Civil Procedure 4. *See Tech Hills II*, 5 F.3d at 968. Similarly, if a defendant were to find a copy of the complaint on either a curb or a website, the defendant would not have actively "recei[ved]" a copy of the complaint from the plaintiff; mere passive discovery should not suffice. *Cf. Uni-Bond, Ltd. v. Schultz*, 607 F. Supp. 1361, 1364-65 (E.D. Wis. 1985); *Robert E. Diehl, Inc. v. Morrison*, 590 F. Supp. 1190, 1191 (M.D. Pa. 1984).

Of course, none of these hypotheticals have anything to do with the facts of this case, where the defendant's vice president-risk manager received a file-stamped copy of the summons and complaint and promptly expressed his company's intent to remove the case to federal court. It is hard to imagine a defendant *less* entitled to application of a "proper service rule"

on equitable grounds than Murphy. Nonetheless, to the extent the petitioner's and *amici*'s alleged inequities and policy concerns have any merit, they "cannot override . . . the text and structure of the Act." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

II.

THE LEGISLATIVE HISTORY OF § 1446(b) FAVORS A RECEIPT RULE BECAUSE CONGRESS INTENDED TO ESTABLISH A UNIFORM FEDERAL STANDARD, INDEPENDENT OF STATE LAW.

To overcome § 1446(b)'s text, Murphy argues extensively from the statute's legislative history, but that history provides no compelling reason to ignore the plain language of this statute. The burden is on the petitioner to explain why this Court should "depart from the literal text that Congress has enacted." *Brogan v. United States*, 522 U.S. —, 139 L. Ed. 2d 830, 835 (1998). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal quotation omitted). In other words, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute" like § 1446(b). *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808 n.3 (1989). "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

In any event, the legislative history of § 1446(b) cannot bear the strain of the petitioner's argument. Ironically, Murphy's rewritten statute has more in common with the 1948 version of § 1446(b) than it does with the current language. That version of the statute, enacted in 1948 as part of the

congressional overhaul of Title 28, set the time for removal by "commencement of the action or service of process, whichever is later." Pub. L. No. 80-773, § 1446, 1948 U.S.C.C.A.N. A1, A95. However, Congress quickly realized that tying the federal standard to state service of process rules was not working. As the House Report explained,

> Subsection (b) of section 1446 of title 28, U.S.C., . . . has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.

H.R. Rep. 81-352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, at 1268. Further difficulties arose

> in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant.

Id.

Consequently, Congress rewrote § 1446(b) in 1949 to substitute "receipt" of notice for "service of process." As the House explained, "this amendment . . . indicates that notice need not be given simultaneously with the filing, but may be given promptly thereafter." *Id.* Under the 1949 amendments, notice occurs either upon the defendant's "receipt," "through service or otherwise, of a copy of the initial pleading," or when "service of summons upon the defendant" occurs, provided the "initial pleading has then been filed in court and is not required to

be served on the defendant." Pub. L. No. 81-72, § 83, 1949 U.S.C.C.A.N. 94, 107.

Congress understood that making notice the triggering event was "a major change in the law concerning the removal of cases from state courts to federal courts." S. Rep. No. 81-303 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, at 1253-54. To avoid the anomalies of state service of process rules, Congress chose language that "will meet the varying conditions of practice in all the States." *Id.*, 1949 U.S.C.C.A.N. at 1254. The Senate Report makes it apparent that receipt of either actual or constructive notice is sufficient to trigger the time period, explaining that

> a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for.

Id.

The more persuasive reading of § 1446(b)'s legislative history is that Congress divorced federal removal procedure from the technicalities of state law to correct the mistake it had made in 1948. The speed with which Congress rewrote the statute corroborates this reading. While "proper service" may have been the rule in 1948, Congress changed § 1446(b) to a "receipt" of notice rule in 1949. As the Seventh Circuit concluded,

> by emphasizing the link between possessing a copy of the pleadings and the time for removal, the 1949 deliberations strongly suggest that we should take "or otherwise" seriously: knowledge of the nature of the claims, and not the state's technical rules of service, determines timeliness.

Roe, 38 F.3d at 303. Presumably the petitioner wants this Court to undo what Congress deliberately did when it amended § 1446(b). When Congress amends the United States Code, it completely erases the underlying language; rewriting what Congress has erased is outside the judiciary's purview. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

While Congress may have drafted the current version of § 1446(b) to cover exceptional states like New York and Kentucky, it established a uniform federal rule that transcends the vagaries of state procedural law. The statute's reference to receipt of notice "through service or otherwise" is unqualified. This Court does not make it a practice "to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy — even assuming that it is possible to identify that evil from something other that the text of the statute itself." *Brogan*, 139 L. Ed. 2d at 837. Although state service of process rules may stand in the background of § 1446(b), as revealed by the legislative history, the statutory text still governs. Statutes "often go beyond the principal evil to cover reasonably comparable evils," but "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. —, 140 L. Ed. 2d 201, 207 (1998).

By tying the commencement of the removal period to state service of process law, the "proper service rule" thwarts the uniformity that Congress hoped to achieve with its 1949 amendments to § 1446(b). Congress intended to establish a uniform removal period triggered by the defendant's receipt of notice of a removable action, regardless of whether the complaint has been properly served in accordance with a given

state's service rules. In the final analysis, the receipt rule is the most effective way of implementing the express language Congress used to amend § 1446(b) as well as the legislative purpose behind those amendments.

III.

SECTION 1441(b) DOES NOT MAKE SECTION 1446(b) AMBIGUOUS.

Murphy's attempt to escape the text of § 1446(b) by juxtaposing it against § 1441(b) also fails. The two provisions are entirely consistent. Murphy claims that § 1441(b) defines the word "defendant" as a party who is properly joined with service of process. This definition, according to Murphy, not only clarifies the meaning of "defendant" in § 1446(b), but it also renders "receipt . . . through service or otherwise" ambiguous. Murphy has misread § 1441(b). Section 1441(b) does not define "defendant"; it merely eliminates the right to remove if one of the "parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." If Murphy's purported § 1441(b) definition is substituted for "defendant" in § 1446(b), § 1446(b) would state, "[t]he notice of removal . . . shall be filed within thirty days after the receipt by the [parties in interest properly joined and served as defendants], through service or otherwise, of a copy of the initial pleading. . . ." This nonsensical construction confirms that Congress did not intend to define "defendant" in § 1441(b). *See Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd has long been a judicial function").

If § 1441(b) were intended to define "defendant" for all removal statutes, it would say "a defendant, for purposes of removal, is a party properly joined and served." It does not say

that. That Congress felt it necessary to utilize the phrase "parties properly joined and served as defendants" instead of the word "defendants" proves that proper joinder and perfected service of process are not prerequisites for creating a "defendant." Indeed, because Congress included proper joinder and service to modify "defendant" in § 1441(b) but excluded those same modifiers in § 1446(b), the "disparate inclusion and exclusion" must be given effect. *See Gozlon-Peretz*, 498 U.S. at 404.

A party being sued may have defenses based on improper joinder or improper service of process, but that does not mean the party is not a "defendant." This Court held long ago that service of process is not necessary for a party to be viewed as a "defendant." *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). In *Pullman*, this Court held that a named resident defendant defeated diversity removal, even though the resident defendant had not been served at the time of removal. *Id.* at 541. While the Court recognized that this rule might prejudice removing defendants if a resident co-defendant were never served, the Court explained that diversity of citizenship does not exist where a resident co-defendant is named in the complaint. *Id.*

Congress amended § 1441(b) in 1948 to prevent in-state defendants, "properly joined and served," from removing cases to federal court. Pub. L. No. 80-773, § 1441, 1948 U.S.C.C.A.N. A1, A93. The amendment does not change *Pullman*'s holding, however, because the amendment to § 1441(b) must be read against the general principle contained in § 1441(a). *Pecherski v. General Motors Corp.*, 636 F.2d 1156, 1160 (CA8 1981); *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (CA9 1969). Section 1441(a) restricts removal jurisdiction to include only those cases that could have been filed originally in the federal court. Accordingly, the specific amendment to § 1441(b), barring in-state defendant removal, does not alter the more general requirement of complete diversity imposed

by § 1441(a). This holds true even where the resident defendant is unserved at the time of removal, because complete diversity would be lacking despite the flaw in service. *See Pecherski*, 636 F.2d at 1160; *Clarence E. Morris, Inc.*, 412 F.2d at 1176.

Section 1441(b) cannot bear the strain of Murphy's argument. To argue that a provision barring in-state defendant removal means that a defendant must be properly served to be a "defendant" stretches § 1441(b)'s language past the breaking point. Even if it could sustain such pressure, § 1441(b) would not support rewriting § 1446(b)'s "receipt, through service or otherwise" into the proper service rule. Nothing in § 1441(b) makes § 1446(b) ambiguous. "The mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990) (internal quotation omitted).

IV.

READING SECTION 1446(b) AS A RECEIPT RULE DOES NOT VIOLATE DUE PROCESS.

In a final attempt to preserve its removal, Murphy tries to make service of process a component of due process. This argument does not withstand scrutiny. The receipt rule does not threaten any due process rights. In making due process objections to the receipt rule, Murphy and the *amici* repeatedly confuse service of process with personal jurisdiction. The two are entirely separate concepts with distinct procedural consequences. While personal jurisdiction is a component of due process, the technicalities of service of process are not. *See* 5A *Wright & Miller, Federal Practice and Procedure: Civil 2d* § 1391, at 756 (1990). The lack of personal jurisdiction raises constitutional due process issues that are not waived by the

defendant's failure to appear. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). In contrast, objections based on defective or improper service of process do not implicate constitutional due process concerns and, therefore, are waived by a defendant who fails to raise them in timely fashion. *See* Fed. R. Civ. P. 12(h)(1); *Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 897, 900 (CA11 1990). This explains why personal jurisdiction provides valid grounds to attack a judgment collaterally, but improper service of process does not similarly excuse a default.

The defendant's right to remove a diversity case to federal court does not implicate due process. Indeed, waivers of removal rights are tolerated routinely where due process has not necessarily been afforded. For example, if one defendant waives its removal rights, it does so for itself and likely for all subsequently served defendants, even if those defendants had no knowledge whatsoever of the waiver when it occurred. *See* Brief for Petitioner at 21 n.13 (collecting cases). Similarly, a party may agree to an enforceable forum selection clause in a contract that waives its right to removal, even though, at the time of the waiver, the party had no knowledge of any disputes, no knowledge of whether the disputes would entitle it to a federal forum, and no knowledge of whether any tactical reasons existed for being in federal court. *See Milk "N" More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (CA10 1992).

Any attempt to glorify the defendant's right to seek diversity-based removal fails. As this Court recognized in *Shamrock Oil*, Congress's purpose since 1887 has been to restrict the removal jurisdiction of the federal courts. 312 U.S. at 108-09. Since *Shamrock Oil* was decided, Congress has increased the amount-in-controversy requirement for diversity removals to $75,000. 28 U.S.C. § 1332. It has eliminated a resident defendant's right to remove on the basis of diversity under § 1441(b) as well as a

defendant's right to remove a case after one year has elapsed under § 1446(b). Furthermore, the defendant has almost no right to seek appellate review of a remand order. 28 U.S.C. § 1447(d). The ever-shrinking scope of diversity removal conclusively rebuts any suggestion that a defendant's fundamental due process rights are somehow undermined by the receipt rule.

Even if due process concerns were implicated by this case, the defendant's rights are adequately protected by the United States Code and the Federal Rules of Civil Procedure. When the defendant receives a copy of the complaint, through whatever means, it can easily assess whether it has grounds to remove the action to federal court, and it can satisfy the requirement of setting forth a "short and plain statement of the grounds for removal," as demanded by 28 U.S.C. § 1446(a). Proper service in accordance with state procedural rules adds nothing. If the defendant has the complaint in hand, *through service or otherwise*, it has sufficient information to determine whether it can and should remove. This point is demonstrated amply by Murphy, who, within one day of receiving a faxed courtesy copy of Michetti's summons and complaint, wrote a letter explaining its strategy for defending the case, which included removal to federal court. J.A. 19. There was no reason for Murphy to wait until 30 days after *service* to remove.

A state court defendant in receipt of a removable complaint loses nothing by exercising its right to remove within thirty days after receiving a courtesy copy of the complaint, even if it has not yet been formally served. Filing a notice of removal is the modern equivalent of a "special appearance." *See General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 268-69 (1922). All defenses, including defenses to personal jurisdiction, are reserved and can be contested in the federal court. *See* 28 U.S.C. § 1441(e); *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 n.4 (CA2 1996). Indeed, Rules 12(b)(4) and (5) empower the removing defendant to challenge service of

process and adequacy of process, and those defenses are not waived upon removal. *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 133-34 (1914) (holding the validity of service of process may be challenged in federal district court following removal).

Federal Rule of Civil Procedure Rule 81(c), discussed at length by Murphy and the *amici*, gives the removing defendant at least five more days after filing the notice of removal to file a responsive pleading. Rule 81(c)'s use of "receipt through service or otherwise" means that the defendant who decides to exercise its removal rights might be required to file a responsive pleading in the federal court before formal service of process. Murphy and the *amici* vociferously object to this possibility. But Rule 12 provides the defendant with a simple, yet effective procedural option. Instead of filing an answer to the merits of the complaint, the unserved defendant, within five days after removing the case, can file a motion to dismiss under Rules 12(b)(4) and (5). That motion, which attacks the sufficiency and adequacy of process, enables the defendant to put off answering the merits of the complaint until proper service has been perfected. In this manner, the defendant preserves not only its federal forum, but also its right to insist upon proper service of process. The receipt rule sacrifices none of the defendant's procedural options once the case arrives in federal court.

CONCLUSION

Every Circuit Court of Appeals to address this issue has held that the defendant's actual receipt of the complaint, whether by formal service or otherwise, commences the thirty-day removal period set by 28 U.S.C. § 1446(b). This unanimity reflects the clarity of Congress's language as well as its intent to create a uniform federal rule, separate from the technicalities governing state service of process. As the weight of authority holds, the receipt rule is the proper reading of § 1446(b). This Court should therefore affirm the decision below.

Respectfully submitted,

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